United States Court of Appeals
for the
Fifth Circuit

Case No. 19-60662

DENNIS HOPKINS, individually and on behalf of a class of all others similarly situated; HERMAN PARKER, JR., individually and on behalf of a class of all others similarly situated; WALTER WAYNE KUHN, JR., individually and on behalf of a class of all others similarly situated; BRYON DEMOND COLEMAN, individually and on behalf of a class of all others similarly situated; JON O'NEAL, individually and on behalf of a class of all others similarly situated; EARNEST WILLHITE, individually and on behalf of a class of all others similarly situated,

Plaintiffs-Appellees,

v.

SECRETARY OF STATE MICHAEL WATSON, in his official capacity,

Defendant-Appellant,

CONSOLIDATED WITH

Case No. 19-60678

DENNIS HOPKINS, individually and on behalf of a class of all others similarly situated; HERMAN PARKER, JR., individually and on behalf of a class of all others similarly situated; WALTER WAYNE KUHN, JR., individually and on behalf of a class of all others similarly situated; JON O'NEAL, individually and on behalf of a class of all others similarly situated; EARNEST WILLHITE, individually and on behalf of a class of all others similarly situated; BRYON DEMOND COLEMAN, individually and on behalf of a class of all others similarly situated,

Plaintiffs-Appellees Cross-Appellants,

v.

SECRETARY OF STATE MICHAEL WATSON, in his official capacity,

Defendant-Appellant Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, NORTHERN DIVISION IN CASE NO. 3:18-CV-188-DPJ-FKB, HONORABLE DANIEL P. JORDAN, III, CHIEF JUDGE

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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The foregoing individuals are the named plaintiffs in *Hopkins, et al. v. Watson*.

They seek to represent the following class, which was certified by the District Court:

> Any person who (a) is or becomes disenfranchised under Mississippi state law by reason of a conviction of a disenfranchising offense, and (b) has completed the term of incarceration, supervised release, parole, and/or probation for each such conviction.

Order at 6, *Harness, et al. v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB (S.D. Miss. Feb. 13, 2019), Dkt. 89.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument has been scheduled for Tuesday, January 23, 2024 at 9:00 AM.

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PRELIMINARY STATEMENT

This appeal concerns Mississippi's harsh and unforgiving felony disenfranchisement scheme. Section 241 of Mississippi's Constitution punishes citizens convicted of a wide range of felonies by forever depriving them of the right to vote even after sentence completion, no matter how minor the underlying crime, the length of their sentence, or their age (a minor can be permanently disenfranchised before even reaching voting age). Section 253 empowers the Mississippi Legislature to restore voting rights on a case-by-case basis, without governing standards. Section 241 is unconstitutional under the Eighth and Fourteenth Amendments. Section 253 is unconstitutional under the First and Fourteenth Amendments.

Section 241 Violates the Eighth Amendment. Section 241 constitutes cruel and unusual punishment under the Eighth Amendment.

The district court erred by failing to perform any Eighth Amendment analysis and incorrectly relying on *Richardson v. Ramirez* to find that it would be "internally inconsistent for the Eighth Amendment to prohibit criminal disenfranchisement while § 2 of the Fourteenth Amendment permits it." ROA.19-60662.4878 (District Ct. Op.); 418 U.S. 24, 56 (1974). *Richardson* did not consider whether Section 2 immunizes felony disenfranchisement laws from other constitutional constraints, including the Eighth Amendment. The Supreme Court

has expressly "rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49–50 (1993).

Defendant argues that Eighth Amendment protections should be limited solely because they are "rooted in the Fourteenth Amendment, and *Richardson* rejects the view that section 1 of that Amendment overrides section 2." CA5 Dkt. 218 ("Def. Br.") at 20. But *Richardson* addressed whether the Equal Protection Clause of Section 1 of the Fourteenth Amendment, *per se*, prohibits felony disenfranchisement. *Richardson*, 418 U.S. at 54. It does not narrow the scope of substantive rights, such as the Eighth Amendment, incorporated through the Due Process Clause of the Fourteenth Amendment. *See generally id.*; CA5 Dkt. 165-1 ("Op.") at 26-27. Substantive rights—including the Eighth Amendment's—are "not diluted or somehow lesser in content by virtue of being incorporated through the Fourteenth Amendment." *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010).

A proper Eighth Amendment analysis demonstrates that Section 241 constitutes "punishment" under the "intents-effect" test set forth in *Smith v. Doe*, 538 U.S. 84, 92 (2003). Mississippi enacted Section 241 as punishment. The plain text of the "Act to admit the State of Mississippi to Representation in the Congress of the United States" (the "Readmission Act") prohibits criminal

disenfranchisement for any purpose other than punishment. Act of Feb. 23, 1870, ch. 19, 16 Stat. 67.

Defendant does not contest that the Readmission Act allowed disenfranchisement only as a form of punishment. Instead, Defendant argues that the Readmission Act and, separately, the Reconstruction Act, recognized states' power to disenfranchise. Def. Br. at 32. Defendant's argument is beside the point. That these Acts may have contemplated disenfranchisement says nothing regarding the purpose of such disenfranchisement, or, specifically, whether Mississippi's lifetime disenfranchisement scheme constitutes punishment. Defendant offers no reasoned basis to give the word "punishment," as used in the Readmission Act, a meaning other than its plain meaning. Punishment means punishment, not the "consequence of a crime." Regardless of the Readmission Act, Section 241 imposes punishment because it was "imposed for the purpose of punishing." *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958) (recognizing that a felony disenfranchisement provision would be penal if it "were imposed for the purpose of punishing").

Section 241 also bears the hallmarks of punishment. Defendant argues that lifetime disenfranchisement schemes are not punitive in effect because they are not historically regarded as punishment and impose no "physical restraint" or affirmative duty. Def. Br. at 21-24; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). A restraint may impose punishment even if not physical. *See Does*

#1-5 v. Snyder, 834 F.3d 696, 703 (6th Cir. 2016) (finding that sex-offender statute was punishment although its "restraints [were] not physical" because it "put significant restraints on how registrants may live their lives"). Multiple courts have found that criminal disenfranchisement provisions are a punitive device. *See, e.g.*, *Johnson v. Gov'r of Fla.*, 405 F.3d 1214, 1218 n.5 (11th Cir. 2005) ("throughout history, criminal disenfranchisement provisions have existed as a punitive device."). Section 241 imposes a severe "disability or restraint" as evidenced by the "effects of [Section 241] [] felt by those subject to it," and thus imposes punishment. *See Smith*, 538 U.S. at 99-100.

Section 241 is "cruel and unusual" punishment based on an "evolving standards of decency" inquiry under *Graham*'s two-step categorical approach. *See Graham v. Florida*, 560 U.S. 48, 61 (2010); Op. at 33 n.8, 44–45. Defendant incorrectly claims that the categorical approach applies only to "death-penalty cases and those involving juvenile offenders sentenced to life-without-parole." Def. Br. at 35. The fact that the Supreme Court has yet to consider this res nova issue does not mean the categorical approach is expressly limited to such cases. Courts have applied the categorical approach to Eighth Amendment challenges to other types of punishments, including juvenile sex-offender registration. *See, e.g.*, *People ex rel. T.B.*, 489 P.3d 752, 761-62, 772 (Col. 2021). The categorical approach is appropriate for legislation implicating a "particular type of sentence as

it applies to an entire class of offenders who have committed a range of crimes." *Graham*, 560 U.S. at 61-62. Because Section 241 applies to an "entire class" of individuals who committed a "range of crimes," this approach applies.

Under step one of the categorical approach, there is a clear national consensus against lifetime disenfranchisement. *See Graham*, 560 U.S. at 61. The Panel found that as of 1974, twenty-seven states permanently disenfranchised individuals for non-election related offenses. *See* Op. at 45 (Appendix). Today, only eleven states do so. *See* Addendum. Of these eleven states, seven impose a lifetime voting ban only for certain categories of disenfranchising offenses, and two states—Kentucky and Iowa—have restored voting rights to felons convicted of some or all categories of disenfranchising offenses via Executive Order. *See id*. That means that today, *only two states in the nation*—Mississippi and Virginia—have in effect a lifetime voting ban for all disenfranchising offenses. *Id*.

Section 241 also satisfies step two of the categorical approach; it is plainly "a disproportionate punishment" for individuals who have completed their sentences. *See Roper v. Simmons*, 543 U.S. 551, 564 (2005)). As the Panel recognized, "'[n]o right is more precious in a free country' than the right to vote." To permanently take that fundamental right away from a citizen, despite the completion of their sentence, the nature of their crime and culpability, and their age and mental acuity, is an "exceptionally severe penalty, constituting nothing short of

the denial of the democratic core of American citizenship." Op. at 40. Accordingly, Section 241 constitutes cruel and unusual punishment and is unconstitutional under the Eighth Amendment.

Section 241 Violates the Equal Protection Clause. Section 241 is also unconstitutional for the independent reason that it violates the Equal Protection Clause.

Section 241 falls outside the limited exemption from the representation penalty in Section 2 of the Fourteenth Amendment for laws that temporarily "abridge" the right to vote on the basis of criminal convictions. Supreme Court precedent and legislative history establish that the word "abridge" in Section 2 refers to a *temporary* loss of voting rights rather than a complete "denial" of such rights. Section 241 falls outside Section 2's "other crime" exemption because it permanently denies, rather than temporarily abridges, the right to vote, and is therefore subject to strict scrutiny, which it does not satisfy.

Contrary to Defendant's contention, *Richardson* does not preclude Plaintiffs' claim. Def. Br. at 39. *Richardson* held no more than that the Equal Protection Clause does not "bar outright a form of disenfranchisement which was *expressly exempted* from" Section 2's penalty. 418 U.S. at 55 (emphasis added). *Richardson* did not consider whether Section 2's "other crime" exemption applies only to laws that temporarily "abridge" the right to vote, rather than laws that

permanently "deny" this right. *See Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1366 (2020) (Gorsuch, J., concurring in part) (finding that the Supreme Court should not be bound by prior decision that assumed two statutory definitions were interchangeable where the issue of interpreting them together "was not briefed, argued, or decided").

Section 253 is Unconstitutional and Plaintiffs Have Standing to Bring Their Claims. As a threshold matter, the district court correctly held that Plaintiffs have standing to pursue their Section 253 claims. ROA.19-60662.4865 (District Ct. Op.). Plaintiffs' Section 253 injuries are fairly traceable to and redressable by the Secretary, who is Mississippi's "chief election officer" and holds responsibilities for enforcing Section 253. For this reason, *Ex parte Young*'s exception to sovereign immunity does not bar Plaintiffs' claims.

Section 253 is unconstitutional under the Equal Protection Clause because it arbitrarily restores voting rights to some individuals convicted of disenfranchising felonies but not others, with no rational basis. Section 253 is also unconstitutional because it is based on racially discriminatory intent. The 1890 Mississippi Legislature enacted Section 253 with racially discriminatory intent, Section 253 has never been cleansed of that discriminatory taint through amendment, and Section 253 continues to disproportionately impact Black Mississippians today.

Section 253 therefore violates the Equal Protection Clause under *Hunter v. Underwood*, 471 U.S. 222 (1985).

Additionally, Section 253 is unconstitutional for the independent reason that it provides no objective criteria for the Mississippi Legislature to restore voting rights on a case-by-case basis. It thus vests the Legislature with unfettered discretion to determine which affected individuals may speak by registering to vote, violating the First Amendment. Accordingly, the Court should remand the case to the district court with instructions to declare Sections 241 and 253 unconstitutional.

STATEMENT OF THE ISSUES

1. Does Section 241 violate the Eighth Amendment where (i) constitutional provisions granting states the power to legislate are subject to constitutional limitations, (ii) it imposes punishment, (iii) there is national consensus against lifetime disenfranchisement, and (iv) the en banc Court should follow the Panel's well-reasoned decision and find in its independent judgment that Section 241 is cruel and unusual?

2. Does Section 241 violate the Fourteenth Amendment's Equal Protection Clause because (i) *Richardson* does not foreclose consideration of whether Section 2 exempts from the representation penalty laws that temporarily "abridge" the right to vote, but not that permanently deny this right, (ii) Section

241 falls outside the scope of Section 2's "other crime" exemption, and (iii) Section 241 is therefore subject to (and fails) strict scrutiny review?

3. Do Plaintiffs have Article III standing and does the *Ex parte Young* exception apply with respect to their Section 253 claims where Plaintiffs' injuries are fairly traceable to and redressable by the Secretary as the chief election officer who has a connection with the enforcement of Section 253?

4. Does Section 253 violate the Equal Protection Clause where Section 253 arbitrarily restores voting rights to only some individuals, with no rational basis for distinguishing between the handful who regain the right to vote and the tens of thousands who remain disenfranchised?

5. Does Section 253 violate Equal Protection on race-based grounds where the 1890 Mississippi Legislature enacted Section 253 with racially discriminatory intent, Section 253 has never been amended, and it continues to have a disproportionate impact?

6. Does Section 253 violate the First Amendment where it vests the Mississippi Legislature with unfettered discretion to determine which individuals convicted of disenfranchising felonies may speak by registering to vote?

STATEMENT OF THE CASE

A. Mississippi's Disenfranchisement Scheme

Under Section 241 of Mississippi's Constitution, individuals convicted in

Mississippi state courts of numerous felonies lose the right to vote forever. MISS. CONST. art. XII, § 241. These felonies are wide-ranging, including relatively minor crimes, such as writing a bad check for $100 or stealing $250 worth of timber. Miss. Code Ann. §§ 97-17-59(2) (2004), 97-19-67(1)(d) (2015). Disenfranchised individuals who register to vote or cast a ballot are subject to severe criminal penalties. Miss. Code Ann. §§ 97-13-25, 97-13-35 (2017).

Section 253 of the Mississippi Constitution establishes a standard-less legislative process for the case-by-case restoration of voting rights. It provides:

> The Legislature may, by a two-thirds vote of both houses, of all members elected, restore the right of suffrage to any person disqualified by reason of crime; but the reasons therefor shall be spread upon the journals, and the votes shall be by yeas and nays.

MISS. CONST. art. XII, § 253.

B. Sections 241 and 253's Discriminatory Taint

Sections 241 and 253 were enacted as part of Mississippi's 1890 Constitution. MISS. CONST. art. XII, §§ 241, 253. The voting-related provisions of the 1890 Constitution were designed to disenfranchise Black Mississippians. ROA.19-60662.1793-1794, 1816 (Pratt Report); *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896). Today, Mississippi's population of post-sentence disenfranchised individuals is disproportionately Black. ROA.19-60662.1767-1768 (Rothman Report). Between 1994 and 2017, nearly 50,000 individuals were convicted of

disenfranchising offenses in Mississippi state courts. *Id.* More than 29,000 of these individuals have completed their sentences, 58% of which are Black and only 36% are white. *Id.* at ROA.19-60662.1771. Between 2013 and 2018, the Mississippi Legislature restored voting rights to just eighteen individuals. ROA.19-60662.1922-1924 (Summ. Chart I).

C. The Secretary's Role

The Secretary is the state's "chief election officer" for purposes of the National Voter Registration Act. Miss. Code Ann. § 23-15-211.1(1) (2008); 52 U.S.C. § 20509. In this capacity, the Secretary "has, as a primary duty, the responsibility to ensure the lawful administration of voter registration in Federal elections." *Voluntary Guidance on Implementation of Statewide Voter Registration Lists, Election Assistance Comm'n*, 70 Fed. Reg. 44593-02, at II(G) (Aug. 3, 2005). For example, the Secretary is statutorily responsible for the state's voter registration application and the Mississippi-specific instructions for the National Mail Voter Registration Application, which set forth the state's voter eligibility criteria. Miss. Code Ann. §§ 23-15-39(1) (2019), 23-15-47(3) (2017); 52 U.S.C. § 20508(a)(2). The Secretary also "implement[s] and maintain[s]" Mississippi's "Statewide Elections Management System" (SEMS), including a "centralized database" (the SEMS voter database) that "constitute[s] the official record of registered voters in every county of the state." Miss. Code Ann. § 23-15-

165(1) (2017); 52 U.S.C. § 21083(a)(1)(A).

D. Procedural History

On March 27, 2018, Plaintiffs filed a putative class action asserting constitutional claims challenging Section 241 under the Eighth and Fourteenth Amendments, and Section 253 under the First and Fourteenth Amendments. ROA.19-60662.14-63 (Compl.). The five named plaintiffs include Dennis Hopkins, who completed his sentence for grand larceny over eighteen years ago, Herman Parker, who completed his sentence for grand larceny over two decades ago, and Walter Wayne Kuhn, Jr., who completed his sentence for grand larceny over thirty years ago. ROA.19-60662.1898 (Hopkins Decl.); ROA.19-60662.1903 (Parker Decl.). Mr. Hopkins owns a towing business and is the former chief of his local fire department. ROA.19-60662.1898 (Hopkins Decl.). Mr. Parker is a "longstanding employee" of the City of Vicksburg, Mississippi. ROA.19-60662.1904 (Parker Decl.). Mr. Kuhn is a home improvement contractor and volunteers to help men recovering from drug addiction. ROA.19-60662.1907 (Kuhn Decl.).

Plaintiffs moved for class certification on August 15, 2018. ROA.19-60662.901-907 (Mot. Class Certification). On February 13, 2019, the district court granted this motion. ROA.19-60662.4843-4849 (District Ct. Order).

1. District Court Decision

Plaintiffs and Defendant cross-moved for summary judgment on October 4, 2018. ROA.19-60662.1748-1761 (Pls. Mot. Summ. J.); ROA.19-60662.2085-2088 (Def. Mot. Summ. J.). On August 7, 2019, the district court denied Plaintiffs' motion and granted Defendant's motion on all claims except Plaintiffs' Section 253 Equal Protection challenge. ROA.19-60662.4857-4885 (District Ct. Op.).

The district court rejected Plaintiffs' Eighth Amendment challenge to Section 241 without addressing its merits because "it would be internally inconsistent for the Eighth Amendment to prohibit criminal disenfranchisement while §2 of the Fourteenth Amendment permits it." *Id.* at ROA.19-60662.4878. The district court also rejected Plaintiffs' Fourteenth Amendment challenge, finding that, even if the Supreme Court had "overlooked [Plaintiffs'] alternative construction" of § 2, *Richardson*'s holding remains binding "because § 2 'affirmative[ly] sanction[ed]' a state's right to deny the franchise based on a criminal conviction, doing so cannot violate § 1 of that same amendment." *Id.* at ROA.19-60662.4876-78.

With respect to Plaintiffs' Section 253 challenges, the district court: (i) dismissed the First Amendment claim, finding that the First Amendment "provides no greater protection for voting rights than is otherwise found in the Fourteenth Amendment"; (ii) held that Plaintiffs were "correct that section 253 provides no

'objective standards'" but did not meet their burden under the rational basis test; and (iii) held the record was insufficient to entitle either party to summary judgment on the statute's discriminatory intent and racial impact. *Id.* at ROA.19-60662.4879-83.

The district court certified, *sua sponte*, its holdings for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Id.* at ROA.19-60662.4884. On September 11, 2019, this Court granted the parties permission to appeal (No. 19-60678). On September 16, 2019, Plaintiffs moved to consolidate the appeal with Defendant's separately-noticed appeal (No. 19-60662), and to expedite both appeals in view of the 2020 elections. Mot. to Consolidate, Expedite Appeals and Shorten Briefing Schedule at 2, *Hopkins v. Watson*, No. 19-60678 (5th Cir. Sept. 16, 2019), Dkt. 20. On September 24, 2019, this Court consolidated the appeals, and over Defendant's objection, expedited them. The appeals were fully briefed on November 18, 2019, and argued on December 3, 2019.

2. Panel Decision

On August 4, 2023, the Panel reversed the district court's decision on Plaintiffs' Eighth Amendment claim. The Panel did not reach the merits of Plaintiffs' Section 253 claims, finding that Plaintiffs lacked standing. Op. at 16.

The Panel found that "the district court erred by omitting entirely to perform" an Eighth Amendment analysis. Op. at 23, 25. The Panel determined

that *Richardson* did not foreclose Plaintiffs' Section 241 Eighth Amendment claim because *Richardson* was limited to an equal protection analysis. Op. at 23-28. It then determined that Section 241 is punishment because its purpose "was to impose punishment" to comply with a "fundamental condition[]" of Mississippi's Readmission Act that limited disenfranchisement to "punishment for a common law felony." Op. at 28-31.

Next, the Panel found that Section 241 imposed "cruel and unusual punishment" because it violated society's evolving standards of decency. Op. at 32-39. The Panel found a national consensus against lifetime disenfranchisement where "the overwhelming majority of states oppose the punishment of permanently disenfranchising felons who have completed all terms of their sentences" and there is a "clear[]...consistency in the direction of change" against permanent felon disenfranchisement. Op. at 34, 37 (cleaned up); *id*. at 45 (Appendix). It rejected Defendant's argument that Plaintiffs must show "a national consensus against permanent disenfranchisement as a punishment for each specific felony offense" and "conclude[d] that our society has set its face against permanent disenfranchisement as a punishment." Op. at 38-39. Lastly, the Panel determined in its independent judgment that Section 241 was not proportional because it applies equally to felons without any consideration of culpability for their crimes and does not "advance[] any legitimate penological goals." Op. at 39-43.

As for Plaintiffs' Equal Protection challenge to Section 241, the Panel did not substantively consider Plaintiffs' argument that § 2 of the Fourteenth Amendment's "other crime" exception applies only when laws temporarily 'abridge' the right to vote and does not apply "when laws, like Section 241 ... permanently 'deny' the franchise." Op. at 20. The Panel stated that it was "bound by the Supreme Court's decision in *Richardson* ... and therefore must conclude that Section 241 ... does not violate the Equal Protection Clause by burdening this fundamental right." Op. at 21. The Panel noted that it "do[es] not contend here that the *Richardson*'s majority's reading of Section 2 is the only plausible interpretation of the provision," explaining that the *Richardson* dissent "forcefully argued that disenfranchisement of ex-felons must withstand the requirements of the Equal Protection Clause...". Op. at 19 n.3. Following the Panel's decision, on August 18, 2023, Defendant filed a petition for rehearing of en banc, which Plaintiffs opposed on August 31, 2023. CA5 Dkts. 181, 193. This Court granted Defendant's en banc petition on September 28, 2023. CA5 Dkt. 196-1.

SUMMARY OF ARGUMENT

I. This Court should find that Section 241 violates the Eighth Amendment's prohibition on cruel and unusual punishment.

A. The district court incorrectly held that the Eighth Amendment does not apply to felony disenfranchisement laws. Section 241 has constitutional limits, and

the Supreme Court decision in *Richardson* does not foreclose Plaintiffs' claim. The district court's reliance on the *Graham v. Connor*, 490 U.S. 386 (1989) decision is also misplaced, as it mistakenly assumed that the Eighth Amendment's standards are unchanging.

B. Section 241 imposes punishment. Mississippi could only have enacted Section 241 for punitive purposes under the Readmission Act, and the face of Section 241 suggests that it was imposed as punishment. Alternatively, Section 241 bears the hallmarks of punishment and is punitive in purpose or effect.

C. Section 241 violates the Eighth Amendment's prohibition on cruel and unusual punishment because it violates evolving standards of decency. Under the applicable two-step categorical approach outlined in *Graham*, there is a national consensus against the punishment of permanent disenfranchisement, and such punishment is disproportionate.

II. This Court should find that Section 241 violates the Equal Protection Clause.

A. Section 241 falls outside Section 2's "other crime" exemption because it permanently "denies," rather than temporarily "abridges," the right to vote on the basis of a felony conviction.

B. *Richardson* does not foreclose consideration of Plaintiffs' Equal Protection challenge to Section 241 because it rests on a different construction of Section 2 that was neither presented to nor addressed by the *Richardson* Court.

C. Section 241 does not satisfy strict scrutiny review because it is neither necessary to promote a compelling state interest nor narrowly drawn to achieve any such interest using the least drastic means.

III. Plaintiffs have established Article III standing and that the *Ex parte Young* exception applies as to its Section 253 claims because the Secretary enforces Section 253.

IV. Section 253 violates the Equal Protection Clause because there is no rational basis for its arbitrary classification between felons who regain voting rights and those who do not.

V. Section 253 violates the Equal Protection Clause because the Mississippi Legislature enacted it with a racially discriminatory intent, it has never been amended, and it continues to have a racially disproportionate impact.

VI. Section 253 violates the First Amendment because it vests the Mississippi Legislature with unfettered discretion to restore voting rights.

STANDARD OF REVIEW

Under 28 U.S.C. § 1292(b), a grant or denial of summary judgment is reviewed de novo, applying the same standard as the district court. *Castellanos-*

Contreras v. Decatur Hotels, LLC, 622 F.3d 393, 397 (5th Cir. 2010). Reversal is warranted if the district court "misapplied" precedent, *Energy Dev. Corp. v. St. Martin*, 112 F. App'x 952, 953 (5th Cir. 2004), or made findings "based upon an erroneous view of the law." *Williams v. New Orleans S.S. Ass'n*, 688 F.2d 412, 414 (5th Cir. 1982). "[R]emand is unnecessary" if any remaining issues are "purely legal questions," *BP Expl. & Prod., Inc. v. Claimant ID 100281817*, 919 F.3d 284, 288-89 (5th Cir. 2019), or if "the record permits only one resolution of the factual issue." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

ARGUMENT

II. Section 241 Violates the Eighth Amendment[1]

The Eighth Amendment's prohibition of cruel and unusual punishment "guards against abuses of government's punitive or criminal-law-enforcement authority." *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019). As set forth below, Section 241 violates the Eighth Amendment's prohibition against cruel and unusual punishment and should be deemed unconstitutional by this Court.

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[1] Although Defendant does not challenge Article III standing or the application of the *Ex parte Young* exception for Plaintiffs' Section 241 claims, to the extent necessary, Plaintiffs rely on their prior briefs with respect to these arguments. *See, e.g.*, CA5 Dkt. 60 ("Pls. Opening Br.") at 16-27.

A. *Richardson* Does Not Foreclose the Application of the Eighth Amendment to Section 241

Contrary to Defendant's argument (and the district court's decision), *Richardson v. Ramirez* does not foreclose Plaintiffs' Eighth Amendment claim. In *Richardson*, the Supreme Court held that the Equal Protection Clause did not outright bar felony disenfranchisement. 418 U.S. 56 (1974). The Supreme Court looked to the language of Section 2, which provides for reduced representation when the right to vote is "denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime." *Id.* at 42. Based on this language, the Court reasoned that the "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment," meaning state laws disenfranchising felons could be distinguished from "other state limitations on the franchise which have been held invalid under the Equal Protection Clause." *Id*. at 54.

According to Defendant (and the district court), because the Eighth Amendment applies to the States through Section 1 of the Fourteenth Amendment, *Richardson* forecloses any analysis of the Eight Amendment vis-a-vis Mississippi's permanent disenfranchisement law. Def. Br. at 19 (arguing that Section 1 cannot bar "what section 2 allows"); ROA.19-60662.4878 (District Ct. Op.) (it would be "internally inconsistent for the Eighth Amendment to prohibit

criminal disenfranchisement while § 2 of the Fourteenth Amendment permits it.”).

But *Richardson* does not immunize felony disenfranchisement from an Eighth Amendment challenge. *Richardson* addressed only an Equal Protection challenge to felony disenfranchisement and held only that Equal Protection does not render felony disenfranchisement *per se* unconstitutional. *Richardson*, 418 U.S. at 54. Critically, *Richardson* did not consider, much less decide, whether Section 2 immunizes felony disenfranchisement laws from other constitutional constraints, including the Eight Amendment. As the Panel recognized, neither *Richardson*, nor the “19th century history of Section 2” are “obviously relevant to the ‘evolving standards of decency’ of today that the Eighth Amendment embodies.” Op. at 26. Moreover, Defendant’s position—that, in essence, the protections of the Eighth Amendment should be limited solely because it applies to the states by virtue of its incorporation in the Fourteenth Amendment—is entirely without merit. *Richardson* says nothing about narrowing the scope of substantive rights incorporated through the Due Process Clause. The Supreme Court has definitively rejected Defendant’s underlying rationale. *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) (“Bill of Rights protections are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.”) (internal quotations omitted).

Analogizing to *Graham v. Connor*, the district court reasoned that the Eighth Amendment is inapplicable to felony disenfranchisement laws because it "does not mention voting rights," while "§ 2 … affirmatively sanctions a state's right to deny the franchise based on a criminal conviction." ROA.19-60662.4878 (Dist. Ct. Op.) (citing *Graham*, 490 U.S. 386, 395 (1989)). *Graham*¸ however, which held that the Fourteenth Amendment's substantive due process protections do not apply to an excessive force claim because the Fourth Amendment "provides an explicit source of constitutional protection against [that] sort of … governmental conduct," has no relevance here. *See Soldal v. Cook County*, 506 U.S. 56, 70 (1992) (distinguishing *Graham* and holding that "Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged ... we examine each constitutional provision in turn.").

Defendant's and the district court's position is also inconsistent with the holding of *Richardson* itself. Although *Richardson* held that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment," the Supreme Court made clear that even if felony disenfranchisement is not *per se* unconstitutional under Equal Protection, the power to disenfranchise is not absolute and there are circumstances where it may be unconstitutional. *Richardson*, 418 U.S. at 56 (remanding case to California

Supreme Court to consider whether enforcement of challenged felony disenfranchisement law violated Equal Protection). That the legislative power to disenfranchise recognized in *Richardson* is not absolute and cannot preempt other constitutional guarantees was further confirmed in *Hunter*—a decision authored by Justice Rehnquist who also authored *Richardson*. *Hunter*, 471 U.S. at 232–33. In *Hunter*, the Supreme Court held that an Alabama constitutional provision disenfranchising persons convicted of crimes involving moral turpitude violated Section 1 of the Equal Protection Clause. 471 U.S. at 233. The Court reasoned that "§ 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment." *Id.*

The Fifth Circuit has similarly suggested that felony disenfranchisement provisions are subject to constitutional constraints. *See Harness v. Watson*, 47 F. 4th 296, 311–312 (5th Cir. 2022) (Ho, J., concurring) ("States may not pick and choose which felons to disenfranchise in a manner that contravenes other provisions of the Constitution"); *Shepherd v. Trevino*, 575 F.2d 1110, 1114–15 (5th Cir. 1978) (rejecting "the proposition that [S]ection 2 removes" felony disenfranchisement laws from "equal protection considerations"). As Judge Jones acknowledged in her dissent, constitutional grants of legislative authority "are always subject to the limitation that they must not be exercised in a way that

violates other specific provisions of the Constitution." Op. at 57 (Jones, J., dissenting) (quoting *Rhodes*, 393 U.S. at 29).

Other courts of appeals agree. *See, e.g.*, *Hayden v. Pataki*, 449 F.3d 305, 316 n.11 (2d Cir. 2006) ("The Fourteenth Amendment … does not completely insulate felon disenfranchisement provisions from constitutional scrutiny."); *Thompson v. Alabama*, No. 2:16-cv-783-WKW, 2017 WL 3223915, at *6 n.3 (M.D. Ala. July 28, 2017) ("[T]he Supreme Court [through *Richardson*] has not immunized all felon disenfranchisement laws from constitutional review.").

Defendant attempts to distinguish these cases by arguing that the Panel's finding does not simply "limit ... the exercise of a legitimate power" but instead "void[s] a large swath of the power recognized in section 2" by ruling that "permanent disenfranchisement is entirely unconstitutional." Def. Br. at 20 (internal quotations omitted). Defendant says this is barred by *Richardson*. The Panel's finding, however, does not void Section 2 in its entirety. Instead, the Panel's decision pertains only to Mississippi's permanent disenfranchisement law (Section 241) and to individuals who are barred from voting after completing their sentence (a felon who serves a life sentence can still be permanently disenfranchised). Section 241 also does not exclusively concern voting-related felonies, which some states treat differently than other felonies in the context of lifetime disenfranchisement. The Panel's decision therefore does not consider

whether there is a narrow category of crimes related to voting for which a lifetime ban might arguably be tied to the nature of the offense.

Regardless, neither Section 2 of the Fourteenth Amendment nor *Richardson* preempts the Eighth Amendment's protections, whether as applied it limits a purported "large swath of power" or is narrower in its application. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) ("provisions that grant Congress or the States specific power to legislate in certain areas … are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."); *James Daniel Good Real Prop.*, 510 U.S. at 49–50 ("the applicability of one constitutional amendment pre-empts the guarantees of another.").

B. Section 241 Imposes "Punishment"

The purpose of the Cruel and Unusual Punishments Clause is "to limit the government's power to punish." *Austin v. United States*, 509 U.S. 602, 609 (1993). Section 241 constitutes "punishment" under the "intents-effect" test set forth in *Smith*, 538 U.S. at 92, and adopted by the Fifth Circuit in *Does v. Abbott*, 945 F.3d 307, 314 (5th Cir. 2019); *see also* Op. at 28. Under this test, "[i]f the intention of the legislature was to impose punishment, that ends the inquiry"; and if the intention was not punitive, the statute may be "so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Does*, 945 F.3d at 314.

1. Section 241 Could Only Have Been Enacted "as a Punishment" Under Binding Federal Law

Section 241 is "punishment" because "the intention of the legislature was to impose punishment." *Smith*, 538 U.S. at 92. Under *Smith*'s test, the "plain language" of the Readmission Act, which is binding federal law, shows the legislative intent for Section 241's enactment. *Smith*, 538 U.S. at 94 ("the manner of [a statute's] codification … [is] probative of the legislature's intent"). The Readmission Act prohibited Mississippi from enacting a criminal disenfranchisement provision in its constitution for any purpose beyond punishment, providing that Mississippi's "constitution ... shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote ... *except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted*." Act of Feb. 23, 1870, ch. 19, 16 Stat. 67. (emphasis added); Op. at 28-30.

Under this plain text of the Readmission Act, Mississippi could not have enacted Section 241 for any non-punitive purpose, unless Mississippi violated, and continues to violate, the Readmission Act. U.S. CONST. art. VI, cl. 2; *Rose v. Ark. State Police*, 479 U.S. 1, 3 (1986) ("There can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress."); *Planned Parenthood of Hous. and Se. Tex. v. Sanchez*, 403 F.3d 324, 342 (5th Cir. 2005) (courts "must choose the interpretation … that has a chance of

avoiding federal preemption"); Op. at 29-30, 32. Thus, Section 241 must be construed as a punitive measure.

Defendant relies on *Richardson* to argue that "[t]he Reconstruction-era Congress itself treated criminal history as a matter of voter qualifications rather than as punishment." Def. Br. at 32. *Richardson* pointed to the "fundamental condition" in Readmission Acts, including the restriction that disenfranchisement provisions not be enacted "except as a punishment for such crimes as are now felonies at common law," as "convincing evidence of the historical understanding of the Fourteenth Amendment." 418 U.S. at 51–53. Defendant does not contest that the Readmission Act allowed disenfranchisement only as punishment. Instead, Defendant argues that the Readmission Act and the Reconstruction Act "recognize[] the State's power to disenfranchise." *See* Def. Br. at 32. But even if the Readmission Act recognized the power to disenfranchise, that power was limited to enacting criminal disenfranchisement provisions for the purpose of punishment. That the Acts may have contemplated disenfranchisement says nothing regarding the purpose of such disenfranchisement, or whether Section 241 constitutes punishment.

Defendant also argues that "punishment" as used in the Readmission Act should mean "consequence of a crime." Def. Br. at 32 (citing Op., Diss. at 62). Defendant offers no reasoned basis why "punishment" should mean anything other

than its plain meaning. Simply put, punishment means punishment.

Further, Defendant's interpretation is inconsistent with Congress' use of the word "punishment" in the decade leading up to the Readmission Act. CA5 Dkt. 255-1 ("Amicus Br.") at 15. Congress enacted laws describing "punishments" as criminal penalties subject to imprisonment and fines, rather than non-punitive consequences. *See, e.g.*, 37 Cong. Ch. 56, 12 Stat. 317 (1861) (describing "[a]n Act to punish certain Crimes against the United States" and specifying that any violators would be guilty of a "high misdemeanor" and subject to both imprisonment and fines); 37 Cong. Ch. 31, 12 Stat. 284 (1861) (describing "[a]n Act to define and punish certain Conspiracies" and specifying that any violators would be "guilty of a high crime" and subject to fines, imprisonment, or both); 36 Cong. Ch. 165, 12 Stat. 69 (1860) (describing "[a]n Act providing for the Punishment of Marshals…for permitting the Escape of Prisoners" and specifying that any violators would be "guilty of a misdemeanor" and subject to fines, imprisonment, or both).

Defendant's interpretation is also at odds with how the Supreme Court interpreted disenfranchisement statutes shortly after the Readmission Act. *See, e.g.*, *Murphy v. Ramsey*, 114 U.S. 15, 42–43 (1885) (noting that the disenfranchisement provision of an 1882 Utah statute was not "punishment" for men convicted of bigamy or polygamy because it applied to anyone cohabitating

with more than one woman, but suggesting that this would have been "a penalty" if it applied only to those "found guilty of [such crimes]"). Lawmakers and the Supreme Court alike have consistently viewed the term "punishment" as it is used in the context of Eighth Amendment challenges, *i.e.*, as a form of "reprimand[ing] the wrongdoer" and "deter[ing] others." *See Trop*, 356 U.S. at 96–97.

Furthermore, any suggestion that the Readmission Act became unenforceable upon Mississippi's admission because it imposed ongoing conditions is unfounded. *See* Amicus Br. at 4-8. This argument turns on a series of cases that do not involve the Readmission Act or its "fundamental conditions." *See, e.g., id*. at 4-8 (citing *Coyle v. Smith*, 221 U.S. 559, 565-66, 580 (1911) (finding Congress's restriction on moving Oklahoma's state capital was invalid)); *Hawkins v. Bleakly*, 243 U.S. 210, 216-17 (1917) (finding Congress's restriction on Iowa's abolition of jury trial for employment-related civil claims invalid). The Supreme Court has recognized that Congress can impose voting-related burdens on some states and not others. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (recognizing that "Congress may draft" a voting-related law that imposes restrictions on only some states).

2. Section 241 Was Intended as Punishment on Its Face

Section 241 imposes punishment even without the Readmission Act. On its face, Section 241 imposes a long-term punishment—the denial of a fundamental

and precious right for citizens of a democracy—for conviction of a crime that continues after sentence completion. MISS. CONST. art. XII, § 241 ("Every inhabitant of this state … who has never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector ..."). Collateral consequences of convictions amount to punishment. Section 241 also imposes punishment because disenfranchised individuals who register to vote or cast a ballot in violation of Section 241 are subject to severe criminal penalties. Miss. Code Ann. §§ 97-13-25, 97-13-35; *See Jones v. Bd. of Registrars*, 56 Miss. 766, 768 (1879) (noting that a presidential pardon "releases the punishment and blots out of existence the guilt" and "removes [] penalties and disabilities" so "that in the eye of the law, the offender is as innocent as if he had never committed the offence").

Defendant argues that disenfranchisement laws are never punishment by overstating dicta in the Supreme Court's plurality opinion in *Trop*. Def. Br. at 21. To the contrary, *Trop* recognized that a felony disenfranchisement provision would be penal if it "were imposed for the purpose of punishing," 356 U.S. at 96–97, as Section 241 is here. *See Thompson*, 65 F.4th at 1301–02 (11th Cir. 2023) (noting that *Trop* "explain[ed] that a felon disenfranchisement provision can be penal or nonpenal"). Post-*Trop*, the Supreme Court clarified that legislative intent is

dispositive regarding whether a statute imposes punishment. *See Does*, 945 F.3d at 314 ("If the intention of the legislature was to impose punishment, that ends the inquiry.") (quoting *Smith*, 538 U.S. at 92).

Defendant next argues that Section 241 is nonpenal by pointing to its placement in the state constitution's "Franchise" article, with implementing statutes in the Election Code and not the Criminal Code. Def. Br. at 21-22. But the "location and labels of a statutory provision do not by themselves transform a [criminal] remedy into a [civil] one." *Smith*, 538 U.S. at 94 (2003); Op. at 31. In *Johnson v. City of Grants Pass*, the Ninth Circuit held that enforcement of local anti-camping ordinances authorizing civil sanctions amounted to cruel and unusual punishment, even though such ordinances "impos[ed] a few extra steps before criminaliz[ation]." 72 F.4th 868, 889-95. The placement of Mississippi's permanent disenfranchisement laws is not dispositive of whether Section 241 was intended to punish.

Defendant also speculates that finding felony disenfranchisement punitive would "have profound unjustifiable consequences." Def. Br. at 32. Defendant points to a federal statute disqualifying from jury service individuals convicted of or charged with certain crimes, arguing that "[i]f a felony charge is enough to disqualify someone … to participate in the democratic process without imposing punishment … then a felony conviction is enough." Def. Br. at 33. Defendant

ignores that the right to vote is a "fundamental political right," whereas one's jury service eligibility is not. *State v. Marsh*, 24 P.3d 1127, 1131 (2001) ("[e]ligibility for jury service is not a fundamental right protected by the constitution"); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

3. Section 241 Bears All of the Hallmarks of Punishment

If a statute's "intention was to enact a regulatory scheme that is civil and nonpunitive," a court must "further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Does*, 945 F.3d at 314 (quoting *Smith*, 538 U.S. at 92).

In determining whether a sanction is punitive in effect, courts consider whether: (1) "it has historically been regarded as a punishment"; (2) "the behavior to which it applies is already a crime"; (3) "it comes into play only on a finding of scienter"; (4) "the sanction involves an affirmative disability or restraint"; (5) "its operation will promote the traditional aims of punishment—retribution and deterrence"; (6) "an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "it appears excessive in relation to the alternative purpose assigned." *Kennedy*, 372 U.S. at 168-69. Each test demonstrates that Section 241's "primary function is to serve as an additional penalty." *Id.* at 169-70.

(a) Lifetime Disenfranchisement Has Historically Been Regarded as Punishment

The Readmission Act and other post-Civil War enabling acts evidence the historically punitive purpose of criminal disenfranchisement. *See Richardson*, 418 U.S. at 51-52; *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 229 (1999) (Rehnquist, J., dissenting) (recognizing that individuals convicted of felonies are "denied the franchise as part of their punishment."). As early as the 1800s, states referred to criminal disenfranchisement provisions as a standard form of punishment. *See, e.g.*, ROA.19-60662.2449 (DEL. CONST. art. IV, § 1 (1831)) (empowering the state legislature to "impose the forfeiture of the right of suffrage as a punishment for crime"). Mississippi's criminal code continues to impose disenfranchisement as one of the "[f]urther penalties" for the historic crime of dueling. Miss. Code Ann. § 97-39-3.

The Second Circuit has also found that "state felon disenfranchisement statutes ... have been widely used as a penological tool since before the Civil War." *Muntaqim v. Coombe*, 366 F.3d 102, 104 (2d Cir. 2004), *vacated en banc on other grounds*, 449 F.3d 371 (2d Cir. 2006). The Eleventh Circuit has similarly recognized that "throughout history, criminal disenfranchisement provisions have existed as a punitive device." *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1218 n.5 (11th Cir. 2005); *see also Jones v. Governor of Fla.*, 950 F.3d 795, 819 (11th Cir. 2020) ("Disenfranchisement is punishment. We have said so clearly."), *rev'd*

en banc, 975 F.3d 1016, 1032, 1039 (11th Cir. 2020) (twice referring to disenfranchisement as "punishment").

Defendant contends that *Johnson*'s statement is "non-binding dict[um]." Def. Br. at 24 (citing *Thompson v. Alabama*, 65 F.4th 1288, 1300-02 (11th Cir. 2023)). But *Thompson* did not find that felony disenfranchisement provisions are non-punitive, instead recognizing that they "can be penal or nonpenal." 65 F.4th at 1303.

Defendant cites *Washington v. State*, 75 Ala. 582, 585 (1884) and *Green v. Bd. of Elections of City of New York*, 380 F.2d 445, 450 (2d Cir. 1967), arguing that felon disenfranchisement has "long been regarded as 'a mere disqualification, imposed for protection, and not for punishment.'" Def. Br. at 23. *Washington* considered voting an "honorable privilege," not a fundamental right, 75 Ala. at 585, and Alabama later ended lifetime disenfranchisement for certain offenses. *Green*, which predated the Supreme Court's "intents-effect" test, found that New York's disenfranchisement law was non-punitive without analyzing its intent or effects. 380 F.2d at 450-52. The Second Circuit has since recognized "the nearly universal use of felony disenfranchisement as a punitive device." *Muntaqim*, 366 F.3d at 122-23; *see also Hayden*, 449 F.3d at 327. Furthermore, *Green* found no national consensus against permanent disenfranchisement in view of "the great number of states [42 at the time, according to the court's count] excluding felons

from the franchise." 380 F.2d at 450–51. But in the fifty-six years since *Green*, society's standards changed and a supermajority of states have rejected lifetime disenfranchisement.

(b) Section 241 Applies to Underlying Criminal Behavior

Section 241's exclusive application to individuals convicted of crimes "is significant of penal and prohibitory intent." *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 781, 783 (1994) (quoting *United States v. Constantine*, 296 U.S. 287, 295 (1935) (finding a tax on illegal drug possession constituted "punishment" where it was "imposed on criminals and no others"). Defendant concedes that "disenfranchisement under Section 241 is 'tied to criminal activity.'" Def. Br. at 30.

In *United States v. Bajakajian*, the Court concluded that a statutory currency forfeiture "constitute[d] punishment" because it was "imposed at the culmination of a criminal proceeding and require[d] conviction of an underlying felony," and could not "be imposed upon an innocent owner of unreported currency." 524 U.S. 321, 328 (1998). Section 241 similarly requires an underlying felony conviction. *See also Does #1-5*, 834 F.3d at 705 (holding state sex offender registry act "imposes punishment" because, *inter alia*, it "brands registrants as moral lepers solely on the basis of a prior conviction").

(c) Section 241 Involves Scienter

Defendant claims "Section 241 does not itself impose any 'scienter requirement,'" yet concedes that the "crimes listed in Section 241 [] generally have scienter requirements." Def. Br. at 29-30. Because the crimes listed in Section 241 have scienter requirements, Section 241 "comes into play only on a finding of scienter." *See Kennedy*, 372 U.S. at 168; *Porter v. Coughlin*, 421 F.3d 141 (2d Cir. 2005) (finding that sanction triggered by a criminal conviction involving scienter satisfied this test).

(d) Section 241 Imposes an Affirmative Disability or Restraint

Section 241 imposes a severe "disability or restraint," as evidenced by "how the effects of [Section 241] are felt by those subject to it," objectively and subjectively. *Smith*, 538 U.S. at 99-100. Defendant's argument that those subject to Section 241 are only "subjectively" affected by it fails. Def. Br. at 26. In *McLaughlin v. City of Canton*, the Court found that Section 241 has "draconian consequences" for disenfranchised individuals objectively:

> Disenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box the disenfranchised, the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family.

947 F. Supp. 954, 971 (S.D. Miss. 1995). The criminal enforcement mechanisms for Section 241 amplify its exceedingly harsh consequences. *See Does #1*-5, 834 F.3d at 703 (a law's effects were not "minor and indirect" where the "failure to comply with [its] restrictions carries with it the threat of serious punishment, including imprisonment"). The subjective testimony of the named Plaintiffs echo *McLaughlin*'s objective findings. Dennis Hopkins "feel[s] like a third or fourth-class citizen" because he cannot vote. ROA.19-60662.1898 (Hopkins Decl.). Herman Parker "dread[s] Election Day because it reminds [him] of what [he has] lost." ROA.19-60662.1903 (Parker Decl.).

Defendant also claims felon disenfranchisement imposes no "physical restraint" or affirmative duties. Def. Br. at 24. But a restraint need not be physical, and an affirmative disability does not require a duty. *See Does #1-5*, 834 F.3d at 703 (finding sex-offender statute was punishment although its "restraints [were] not physical in nature" because it "put significant restraints on how registrants may live their lives"); *Johnson v. Bryant*, No. 5:15-cv-64, 2016 U.S. Dist. LEXIS 33212, at *9 (S.D. Miss. Mar. 15, 2016) (finding statute prohibiting employment of people convicted of embezzlement "may work an affirmative disability or restraint"). Defendant further claims that if disenfranchisement were a restraint, "the same could be said of occupational debarment—which the Supreme Court has repeatedly held to be nonpunitive." Def. Br. at 25-26. However, Section

241's "draconian consequences" restricting the fundamental right to vote, cannot legitimately be compared to occupational debarment, which does not implicate a fundamental right. *Compare Johnson*, 2016 U.S. Dist. LEXIS at *13 (acknowledging that holding "public employment is not a recognized fundamental right") (internal quotations omitted), *with Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.").

(e) Section 241's Purpose Included Deterrence and Retribution

Regardless of whether Section 241 effectively advances any legitimate penological goals (which as noted by the Panel, it does not, *see* Op. at 41-43), Section 241's legislative history shows its purpose included deterrence or retribution. *See Kennedy*, 372 U.S. at 181 (finding "[t]he obvious inference" from the absence of any reference to a sanction's non-punitive purpose in the legislative history "is that Congress was concerned solely with inflicting effective retribution"). Section 241's imposition of a blanket prohibition on every individual convicted of a disenfranchising felony evidences its retributive purpose, albeit not a permissible exercise of it. *Mikaloff v. Walsh*, No. 5:06-CV-96, 2007 WL 2572268, at *11 (N.D. Oh. Sept. 4, 2007) (finding a law's "lack of any case-by-case determination demonstrates that the restriction is 'vengeance for its own sake'").

(f) Section 241 Is Excessive in Relation to Any Alternative Purpose

Section 241 does not promote a rational, nonpunitive purpose that is not "excessive with respect to its purpose." *Smith*, 538 U.S. at 97. The Supreme Court has recognized that a statute can serve both penal and non-penal purposes. *See, e.g.*, *Kokesh v. SEC*, 581 U.S. 455, 466 (2017) ("[W]e have emphasized the fact that sanctions frequently serve more than one purpose … A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.") (internal quotations omitted). To the extent Section 241 was imposed for purported regulatory purposes, these were not the primary or exclusive purpose of the lifetime voting ban.

Defendant ignores that Section 241, which disenfranchises permanently, is excessive, even when crediting Defendant's cited "rational and 'nonpenal'" purpose. Def. Br. at 27. Defendant claims that the State "has not exceeded its interest by choosing only to disenfranchise individuals who commit felonies that the State considers especially serious." *Id*. at 28 (internal quotations omitted). Defendant does not show how Mississippi's disenfranchising crimes, such as writing a bad check for $100, are "especially serious" and should result in the permanent forfeiture of voting rights. Nor does Defendant explain how Section 241's amendment removing "burglary" as a disenfranchising crime affects

Defendant's characterizations of "especially serious" crimes. Defendant cannot untangle Section 241's punitive purpose from its claimed nonpenal purpose. *See Austin*, 509 U.S. at 610 ("sanctions frequently serve more than one purpose").

Section 241's lifetime duration, coupled with its across-the-board application, far exceeds any regulatory purpose and is clearly punitive. *See Doe v. Miami-Dade Cnty.*, 846 F.3d 1180, 1185-86 (11th Cir. 2017) (finding plaintiffs adequately alleged that sex-offender residency restriction was "excessive" in relation to asserted "public safety goal" because the "residency restriction applies for life, even after an individual no longer has to register"). Defendant's cited dicta from an 1898 case that "legislatures are entitled 'to make a rule of universal application,'" with a passing reference to "a convict is debarred the privileged of an elector," does not alter the analysis. Def. Br. at 28 (quoting *Hawker v. New York*, 170 U.S. 189, 197 (1898)). As the Panel found, for those found guilty of a crime enumerated in Section 241 who have completed their sentences, "the provision tacks on an exceptionally severe penalty—one that is unconstitutional as to all it ensnares." Op. at 43. Where, as here, "a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones." *Smith*, 538 U.S. at 109 (Souter, J., concurring).

C. Section 241 Violates Evolving Standards of Decency Under *Graham*'s Two-Step Categorical Analysis

There is a "national consensus" against lifetime disenfranchisement. The Court should exercise its "independent judgment" to find that Section 241 is cruel and unusual as applied to individuals who have completed their sentences. Op. at 32–44.

1. The Categorical Approach Applies

Section 241 "implicates a particular type of [punishment] as it applies to an entire class of offenders who have committed a range of crimes." *Graham*, 560 U.S. at 61. It thus requires application of the "categorical approach" to determine whether it violates the Eighth Amendment. *Id*. at 61-62. Under the categorical approach, in considering an Eighth Amendment challenge to a mode of punishment, a court must first consider "objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against" the punishment. *Id*. at 48 (internal quotations omitted). The Court must then "determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Id.* at 49.

Section 241 applies to an "entire class" who committed a "range of crimes." It thus must be analyzed under *Graham*'s categorical approach. Defendant questions the application of the categorical approach, claiming that the Supreme Court has applied it "only for death-penalty cases and those involving juvenile

offenders sentenced to life-without-parole." Def. Br. at 35 (citing *United States v. Farrar*, 876 F.3d 702, 717 (5th Cir. 2017)). But the Supreme Court not yet having heard such cases does not warrant a conclusion that it has expressly limited its use. Courts have applied *Graham*'s categorical approach to cases including for sex offender registration of juveniles. *See, e.g.*, *People ex rel. T.B.*, 489 P.3d 752, 761-62, 772 (Colo. 2021) (holding that mandatory lifetime sex offender registration for juveniles violates the Eighth Amendment).

Defendant's reliance on *Farrar* for the proposition that *Graham* is not applicable is misplaced. *Graham*'s categorical approach was not applicable in *Farrar* because *Farrar* concerned a specific crime (conviction of repeat possession of obscene material) and not "a range of crimes" committed by an entire class of offenders, as is the case here. *Farrar*, 876 F.3d at 716–17; *Graham*, 560 U.S. at 61.

2. There is a National Consensus Against the Punishment of Lifetime Disenfranchisement

Under the categorical approach, when assessing whether there is a "national consensus" against the challenged punishment, courts consider "objective indicia of society's standards" embodied in legislation, including the aggregate number of jurisdictions rejecting the punishment and consistent legislative trends. *Graham,* 560 U.S. at 62.

There is a clear national consensus against lifetime disenfranchisement. In 1967, the Second Circuit held that "the great number of states [42 at the time, according to that court's count] excluding felons from the franchise" precluded an Eighth Amendment challenge to New York's lifetime disenfranchisement law. *Green*, 380 F.2d at 450-51. Society's standards have since significantly changed. Just a few years later, the New York legislature ended lifetime disenfranchisement because "[i]t is inconsistent with the general philosophy of corrections to continue punishment after a person has accounted" for his crimes. ROA.19-60662.2468 (Bill of N.Y. Gen. Assembly, Feb. 16, 1971). One by one, states followed suit, evidencing the trend away from lifetime disenfranchisement. *See, e.g.*, ROA.19-60662.1925-1936 (Summ. Chart II); ROA.19-60662.2476 (Mont. Suffrage and Elections Comm. Proposal, Feb. 12, 1972) (rejecting this "system of permanent punishment"); ROA.19-60662.2489 (Tx. House Study Group Bill Analysis, May 12, 1983) (individuals convicted of felonies should not be "punished for the rest of their lives").

The Panel found that in 1974, seven years after *Green*, twenty-seven states permanently disenfranchised individuals for non-election related offenses. Op. at 45 (Appendix). Today, only eleven states do so for at least one non-election related offense. *See* Addendum. Accordingly, thirty-nine states plus the District of Columbia currently reject permanent disenfranchisement as a form of punishment

for any non-election related offenses. The Supreme Court has found a national consensus where fewer states have rejected a punishment. *See Roper*, 543 U.S. at 564 (national consensus where 30 states rejected punishment); *Atkins v. Virginia*, 536 U.S. 304, 314-16 (2002) (same).

Moreover, the right comparison is arguably a much smaller number. Of the eleven states today that impose permanent disenfranchisement for non-election related offenses, seven impose a lifetime voting ban only for convictions of certain categories of disenfranchising offenses, and two—Kentucky and Iowa—have restored voting rights to felons convicted of some or all categories of disenfranchising offenses via Executive Order. *See* Addendum. Effectively, therefore, *only two states*—Mississippi and Virginia—impose the draconian measure of a lifetime ban for convictions of all disenfranchising offenses. *See* Addendum. As Defendant concedes, "many States have relaxed their restrictions on the franchise for felons," Def. Br. at 36-37, further evidencing the trend away from such draconian punishment. *See Atkins*, 536 U.S. at 315 (noting that "the consistency of the direction of change" indicates a national consensus).

Defendant attempts to avoid arguing that disenfranchisement laws "do not fall into a couple of neat categories," and therefore the Court "cannot soundly condemn indefinite disenfranchisement." Def. Br. at 36. But Defendant ignores that there are "neat categories"—the Panel categorized states by those that

permanently disenfranchise for only election related offenses, those that permanently disenfranchise for a range of crimes, and those that do not permanently disenfranchise at all. Op. at 45 (Appendix). An analysis plainly shows that (like in 2020) only eleven states permanently disenfranchise at all for non-election related offenses and, of those eleven, only Mississippi and Virginia have the draconian sanction of permanently disenfranchising for all disenfranchising offenses.

Nonetheless, Defendant asserts that "[n]early all States disenfranchise in some circumstances," "nearly a third of States" have lifetime disenfranchisement laws, and States that have relaxed their restrictions may later want to change course. Def. Br. at 36, 38. "But this case does not concern the validity of temporary felon disenfranchisement laws," Op. at 38, and Defendant's conflation of categories vastly overstates the landscape. At bottom, since *Green* was decided in 1967, there has been a significant trend, nationwide, against permanent disenfranchisement and, today, Mississippi and Virginia are the only two outlier states which impose broad lifetime voting bans.

3. The Court Should Exercise Its Independent Judgment to Find Lifetime Disenfranchisement Cruel and Unusual

Regarding the second step of *Graham*'s categorical approach, the Court should exercise its independent judgment, as the Panel did, to find that permanent disenfranchisement under Section 241 is "'a disproportionate punishment for'

those Mississippians who have completed their sentences." *Roper,* 543 U.S. at 564; Op. at 39, 43–44. The Court must assess "the severity of the punishment in question," "the culpability of the offenders at issue in light of their crimes and characteristics," and "whether the challenged … practice serves legitimate penological goals." *Graham*, 560 U.S. at 67.

Lifetime disenfranchisement is an exceptionally severe penalty because it involves a "fundamental political right." *Yick Wo*, 118 U.S. at 370; Op. at 40. Because Section 241 applies equally to all members of Plaintiffs' class, regardless of mental state or juvenile status, it does not reflect society's measured response to a felon's moral guilt. *Roper*, 543 U.S. at 570; Op. at 41. Nor does it further any legitimate penological goals of incapacitation, deterrence, and retribution. *Graham*, 560 U.S. at 68. It is thus disproportionate. *Id*. at 71; Op. at 41-43. Accordingly, the Court should find that lifetime disenfranchisement under Section 241 is a disproportionate punishment for Mississippians who have completed their sentences.

4. *Salerno* Is Not Applicable

Defendant argues that Plaintiffs have not shown that there is "'no set of circumstances under which' Section 241 would comport with the Eighth Amendment," by relying on *United States v. Salerno.* Def. Br. at 38-39 (quoting 481 U.S. 739, 746 (1987)). In *Salerno*, the Court stated that a plaintiff asserting a

facial challenge "must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. *Salerno* does not govern Plaintiffs' claims. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 472 (observing that whether the *Salerno* standard "applies in a typical case is a matter of dispute"); *City of Chicago v. Morales*, 527 U.S. 41, 55 n. 22 (1999) (plurality opinion) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself …").

Even if *Salerno* applied, Plaintiffs' class consists of only those who are disenfranchised under Section 241 and "ha[ve] completed the[ir] term of incarceration, supervised release, parole, and/or probation," regardless of the crime for which they were convicted. Order at 6, *Harness, et al. v. Hosemann*, No. 17-cv-00791-DPJ-FKB (S.D. Miss. Feb. 13, 2019), Dkt. 89 (emphasis added). Defendant is incorrect that "[t]here is nothing 'disproportionate'... about permanently stripping the right to vote from brutal murders, child rapists, and egregiously dishonest perjurers." Def. Br. at 38. Section 241 applies equally to all members of Plaintiffs' class, regardless of mental state or juvenile status. Such individuals have already completed their sentences, which a sentencing court deemed proportionate punishment for their crimes; any punishment beyond those sentences is *per se* disproportionate.

III. Section 241 Violates the Equal Protection Clause

Section 241 violates the Equal Protection Clause because it is not narrowly drawn to address a compelling state interest using the least drastic means.

A. Section 241 Falls Outside of Section 2's "Other Crime" Exemption

Section 241 is not "expressly exempted" from Section 2's representation penalty because it permanently denies, rather than temporarily abridges, the right to vote on the basis of a felony conviction. *See Richardson*, 418 U.S. at 55.

1. The "Other Crime" Exemption Applies Only to Laws that "Abridge" the Right to Vote

Section 2 "expressly exempt[s]" from the representation penalty only laws that temporarily "abridge" the right to vote based on "participation in rebellion, or other crime," and not those that permanently "deny" the right to vote on this basis. U.S. CONST. amend. XIV, § 2. Section 2's representation penalty applies if "the right to vote ... is denied" for any reason to male citizens twenty-one years of age and older. *Id.* Section 2's representation penalty also applies if "the right to vote" of such citizens is "in any way abridged," *except* on the basis of "participation in rebellion, or other crime." *Id.* No representation penalty applies if a state denies or abridges the right to vote of non-citizens, men younger than twenty-one, or women.

In contrast, the Fifteenth Amendment provides: "The right of citizens of the

United States to vote *shall not be denied or abridged* by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV (emphasis added). The Fifteenth Amendment uses the combined phrase "shall not be denied or abridged" to impose the same conditions on both denial and abridgement of the right to vote. Section 2, passed just three years prior, separates the words "denied" and "abridged" because Section 2 establishes an exclusion—the "other crime" exemption—that applies only when the right to vote is "in any way abridged," but not when the right to vote "is denied." Other Amendments to the Constitution similarly combine "denied or abridged." *See* U.S. CONST. amend. XIX; amend. XXIV; amend. XXVI.

This construction is embedded in Section 2's grammatical structure. Because the "other crime" exemption immediately follows the phrase "or in any way abridged," it does not reach backwards to modify the distant words "is denied." *See Lockhart v. United States*, 577 U.S. 347, 351 (2016) ("[A] limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012) ("When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent."); *see also Johnson v. Sayre*, 158 U.S. 109, 114 (1895) (the last phrase of the Fifth

Amendment's first clause refers only to the phrase it immediately follows).

Defendant is incorrect that the placement of commas in Section 2 somehow evidences otherwise. Def. Br. at 41-42. Defendant claims that in Section 1's Due Process Clause, which provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law," the phrase "without due process of law" applies to each of "life, liberty or property," due to the placement of commas, and that the same is true for Section 2. *Id*. If Congress intended the "other crime" exemption to apply to laws that deny the right to vote, Congress would have addressed denial and abridgement together, like in the Fifteenth Amendment. *See* U.S. CONST. amend. XV.

The word "abridge" in Section 2 refers to a *temporary* loss of voting rights, rather than a complete "denial" of such rights, as is the case in Section 241. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 259-260 (5th Cir. 2016); *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 359 (1997) (Souter, J., concurring in part). The "core meaning" of the term "abridge" is to "shorten." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 191 (5th Cir. 2020) (noting that "[a]bridgment of the right to vote applies to laws that place a barrier or prerequisite to voting, or otherwise make it more difficult to vote"); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333-34 (1997); ROA.19-60662.2604-2606 (Noah Webster, *An American Dictionary of the English Language* 105 (1828) (defining "abridge" as "[t]o make

shorter" or "[t]o lessen; to diminish")).

Legislative history also demonstrates that the definition of "abridge" refers to a temporary loss of voting rights. *See Richardson*, 418 U.S. at 43 (relying on "legislative history" to interpret Section 2). Congress debated, but ultimately rejected, a provision temporarily disenfranchising former Confederates. ROA.60662.2596-2602 (Cong. Globe, 39th Cong., 1st Sess., 2286, 2771 (1866)). Against this legislative backdrop, the phrase "or in any way abridged" must refer to the *temporary* loss of voting rights. *See Richardson*, 418 U.S. at 54 ("[T]he understanding of those who adopted the Fourteenth Amendment ... is of controlling significance" in interpreting Section 2.).

B. This Court is Not Foreclosed from Considering an Interpretation of Section 2 That Was Not Argued to or Addressed by the *Richardson* Court

The district court and Panel erroneously concluded that they "must reject" Plaintiffs' "alternative construction" of Section 2 because *Richardson*'s "holding is squarely on point." ROA.19-60662.4876-4877 (District Ct. Op.); *see also* Op. at 20-22, 21 n.4. *Richardson*'s holding does not foreclose Plaintiffs' claim.

Richardson held that the Equal Protection Clause does not "bar outright a form of disenfranchisement which was *expressly exempted* from" Section 2's penalty. 418 U.S. at 55 (emphasis added). The *Richardson* Court focused its analysis exclusively on the meaning of the phrase "except for participation in

rebellion, or other crime" (the "other crime" exemption). 418 U.S. at 42-43. Plaintiffs do not challenge the meaning of the "other crime" exemption. Plaintiffs challenge whether Section 2's "other crime" exemption applies only to laws that temporarily "abridge" the right to vote, and not to laws that permanently "deny" this right, which the *Richardson* Court did not consider.

The Supreme Court has held that a legal question that "was not ... raised in briefs or argument nor discussed in the opinion of the Court … is not a binding precedent on this point." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). In *ATL Ritchfield Co. v. Christian*, concurring Supreme Court Justices found that because the issue of how to interpret two statutory definitions together "was not briefed, argued, or decided" in a prior case, it need not be bound by that prior decision that assumed the two terms were interchangeable. 140 S. Ct. 1335, 1366 (2020) (Gorsuch, J., concurring); *see also Garcia v. Gateway Hotel L.P.*, 82 F.4th 750, 760 (9th Cir. 2023) ("[P]rior precedent that does not squarely address a particular issue does not bind later panels on the question") (internal quotations omitted). In making this point, Justices Gorsuch noted, "[t]his Court has long warned that matters 'lurk[ing] in the record, neither brought to the attention of the court nor ruled upon,' should not be read as having decided anything." *Id*. (quoting *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004)). Thus, even if the *Richardson* Court assumed that the "other crime"

exemption modifies the words "is denied" and the phrase "or in any way abridged," that unstated assumption does not foreclose consideration of this question. *See also Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (where the Court has "never squarely addressed" a question but has "at most assumed" the answer, the Court is "free to address the issue on the merits").

Following *Richardson*, the Supreme Court in *Hunter* recognized that Section 2's exemption does not immunize criminal disenfranchisement laws from all constitutional challenges, and applied strict scrutiny to a criminal disenfranchisement law enacted with racially discriminatory intent. 471 U.S. at 233.

C. Section 241 Does Not Satisfy Strict Scrutiny Review

Because Section 241 falls outside Section 2's "other crime" exemption, it is subject to strict scrutiny, which it cannot satisfy. *See Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (strict scrutiny applies "if a challenged statute grants the right to vote to some citizens and denies the franchise to others"). Section 241 is not "necessary to promote a compelling state interest," nor "drawn with precision" to achieve any state interest using the "least drastic means." *Id*. at 337, 343-46 (a state's purported interest in the "purity of the ballot box" did not justify a lengthy durational residency requirement).

IV. Plaintiffs Have Article III Standing to Bring Their Section 253 Claims

Plaintiffs have Article III standing to challenge Section 253. Pls. Opening Br. at 16-25. Article III standing requires: "(1) injury-in fact; (2) fairly traceable causation; and (3) redressability." *Air Evac EMS, Inc. v. Tex. Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 513 (5th Cir. 2017) (internal quotations omitted). Defendant concedes the injury-in-fact requirement is met. ROA.19-60662.2097 (Def. Mem. Auths. Supporting Mot. Summ. J.). The district court correctly held that Plaintiffs' Section 253 injuries are fairly traceable to and redressable by the Secretary as Mississippi's "chief election officer" given his role enforcing Section 253. Pls. Opening Br. at 17-18; ROA.19-60662.4861-4863 (District Ct. Op.). The district court found the Secretary "maintains SEMS," which is "involved in one of the final steps in returning a convicted felon to the voting rolls after he or she successfully files a [S]ection 253 petition." ROA.19-60662.4864-65 (District Ct. Op.); *see also* Pls. Opening Br. at 17-18.

Although the Panel found that "the legislative process for restoration of the franchise [] is not fairly traceable to the Secretary," Op. at 15-16, this contention rests on the faulty predicate that Plaintiffs' "claimed injury is from the legislative process." Op. at 16. Plaintiffs' injuries arise from Section 253's imposition of the unconstitutional burden to obtain the passage of a suffrage bill in order to regain the right to vote, which the Secretary enforces. Pls. Opening Br. at 23-24;

ROA.19-60662.56 ¶ 111 (Compl.). Section 253 thus "impacts [the Secretary's] actions sufficiently to confer standing" on Plaintiffs. *See K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010).

V. The *Ex Parte Young* Exception Applies With Respect to Plaintiffs' Section 253 Claims

The *Ex parte Young* exception applies to Plaintiffs' Section 253 claims. Pl's. Opening Br. at 25-27. The *Ex parte Young* exception to Eleventh Amendment sovereign immunity provides that "where a state actor enforces an unconstitutional law, he is stripped of his official clothing and becomes … subject to suit." *K.P.*, 627 F.3d at 124. Defendant agrees that *Ex parte Young* applies if "the state officer has 'some connection' with the 'enforcement'" of the challenged law. *Id.*; Def. Br. at 46. The district court correctly found that the Secretary "does have 'some connection with the enforcement of the act in question,'" ROA.19-60662.4865 (District Ct. Op.), for the same reasons Plaintiffs have Article III standing.

VI. Section 253 Violates the Equal Protection Clause

Section 253 violates the Equal Protection Clause. *See* Pls. Opening Br. at 48-55.

First, the district court erroneously determined that Section 253 is a "matter of clemency," *see* Pls. Opening Br. at 49-51; ROA.19-60662.4881 (District Ct. Op.), and erred in relying on *Beacham v. Braterman* to reject Plaintiffs' equal

protection challenge to Section 253. 300 F. Supp. 182, 184 (S.D. Fla. 1969), *aff'd mem.*, 369 U.S. 12 (1969); Def. Br. at 56-60. However, *Beacham* does not foreclose Plaintiffs' claim. In *Beacham*, the court held that Florida's discretionary executive clemency regime for the case-by-case restoration of voting rights does not violate the Equal Protection Clause because it is "part of the pardon power and as such is an act of executive clemency not subject to judicial control." 300 F. Supp. at 184. *Beacham* does not apply to reenfranchisement laws, as confirmed by this Court in *Shepherd*. 575 F.2d at 1111, 1115 (finding felon reenfranchisement "must bear a rational relationship to ... a legitimate state interest").

Second, the district court found that Section 253 passes muster under the Equal Protection Clause because it is "rationally related" to the "legitimate governmental interest" in "excluding from the franchise" individuals who violated laws sufficiently important to be deemed felonies. ROA.19-60662.4882 (District Ct. Op.); *see also* Def. Br. at 58. But the district court made no attempt to determine whether there is a rational basis for Section 253's *classification* between the few disenfranchised individuals who regain the right to vote and the thousands of others who must remain disenfranchised—as *Shepherd* requires. *See* Pls. Opening Br. at 51-53. There cannot be any rational basis for the Mississippi Legislature's conclusion that between 2013 and 2018, just eighteen disenfranchised individuals merited restoration of voting rights. *See* Pls. Opening

Br. at 51-53; ROA.19-60662.1922-1924 (Summ. Chart I).

Third, Section 253 is inherently arbitrary because it establishes no standards for distinguishing between those who regain the franchise and those who remain disenfranchised. *See* Pls. Opening Br. at 54-55. Defendant concedes this, claiming "it does not matter if Section 253 does not impose standards." Def. Br. at 59. In *Shepherd*, this Court held that a state reenfranchisement law may not "make a completely arbitrary distinction between groups of felons with respect to the right to vote." 575 F.2d at 1114. There is no dispute that Section 253 vests the Mississippi Legislature with unrestricted "power to establish two classes" of individuals convicted of felonies, "those who may vote and those who may not." *Davis v. Schnell*, 81 F. Supp. 872, 878 (S.D. Ala. 1949) (striking down Alabama's standardless constitutional interpretation test), *aff'd*, 336 U.S. 933 (Ala. 1949). "Such arbitrary power amounts to a denial of equal protection of the law." *Id.*

VII. Section 253 Violates Equal Protection Based on its Racially Discriminatory Intent

Under *Hunter*, "[o]nce racial discrimination is ... a 'substantial' or 'motivating' factor behind enactment of [a] law," the law's defenders must demonstrate it "would have been enacted without this factor." 471 U.S. at 228. The district court denied both parties' motions for summary judgment on Plaintiffs' race-based equal protection challenge to Section 253 because it: (i) found "conflicting evidence" as to the 1890 Mississippi Legislature's

discriminatory intent in enacting Section 253; and (ii) determined that "the record is not sufficient to hold" that the 1890 Mississippi Legislature would have enacted Section 253 absent discriminatory intent. ROA.19-60662.4883 (District Ct. Op.); *see also* Pls. Opening Br. at 57-68.

The record is replete with evidence that the 1890 Mississippi Legislature enacted Section 253 with racially discriminatory intent and would not have enacted it otherwise. Pls. Opening Br. at 58-65. Contrary to Defendant's contentions, *see* Def. Br. at 53-54, the 1986 Mississippi Legislature's failure to amend Section 253 has no relevance as to whether the 1890 Mississippi Legislature would have enacted Section 253 absent racially discriminatory intent. Pls. Opening Br. at 63-64.

Defendant incorrectly argues that Plaintiffs must "show that Section 253 has a present-day 'discriminatory effect,'" Def. Br. at 50; Pls. Opening Br. at 67-68, and incorrectly conflates the elements of two separate types of equal protection challenges to facially neutral laws: "that the government has applied [the law] … in an intentionally discriminatory manner" and the law was "motivated by a racially discriminatory purpose" with a "racially disproportionate impact." *Rothe Dev., Inc. v. U.S. Dep't of Def.*, 836 F.3d 57, 63 (D.C. Cir. 2016). Plaintiffs have proved that Section 253 was enacted with discriminatory intent, has never been amended, and continues to have a disproportionate impact.

VIII. Section 253 Violates the First Amendment

The district court incorrectly concluded that "[t]he First Amendment provides no greater protection for voting rights than is otherwise found in the Fourteenth Amendment." ROA.19-60662.4879 (District Ct. Op.); *see also* Pls. Opening Br. at 55-57. However, these protections are distinct: the Equal Protection Clause prohibits arbitrary classification between categories of individuals convicted of felonies, while the First Amendment prohibits laws that vest government officials with unfettered discretion to determine who may engage in political speech by registering to vote, given the risk of content-based discrimination. *Compare Shepherd*, 575 F.2d at 1114-15, *with City of Lakewood v. Plain Dealer Publ'g. Co.*, 486 U.S. 750, 759 (1988) (upholding facial challenge to law vesting government official with unbridled discretion because of the possibility they might "discriminate ... by suppressing disfavored speech or disliked speakers"). The district court was required to "examine each constitutional provision in turn." *Soldal*, 506 U.S. at 70. Because Section 253 provides no objective criteria for the Mississippi Legislature, it plainly allows for discrimination.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Dated: November 29, 2023

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CERTIFICATE OF SERVICE

I, Jonathan K. Youngwood, hereby certify that on November 29, 2023, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, by which service was accomplished on all counsel of record.

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United States Court of Appeals

for the

Fifth Circuit

Case No. 19-60662

DENNIS HOPKINS, individually and on behalf of a class of all others similarly situated; HERMAN PARKER, JR., individually and on behalf of a class of all others similarly situated; WALTER WAYNE KUHN, JR., individually and on behalf of a class of all others similarly situated; BRYON DEMOND COLEMAN, individually and on behalf of a class of all others similarly situated; JON O'NEAL, individually and on behalf of a class of all others similarly situated; EARNEST WILLHITE, individually and on behalf of a class of all others similarly situated,

Plaintiffs-Appellees,

v.

SECRETARY OF STATE MICHAEL WATSON, in his official capacity,

Defendant-Appellant,

CONSOLIDATED WITH

Case No. 19-60678

DENNIS HOPKINS, individually and on behalf of a class of all others similarly situated; HERMAN PARKER, JR., individually and on behalf of a class of all others similarly situated; WALTER WAYNE KUHN, JR., individually and on behalf of a class of all others similarly situated; JON O'NEAL, individually and on behalf of a class of all others similarly situated; EARNEST WILLHITE, individually and on behalf of a class of all others similarly situated; BRYON DEMOND COLEMAN, individually and on behalf of a class of all others similarly situated,

Plaintiffs-Appellees Cross-Appellants,

v.

SECRETARY OF STATE MICHAEL WATSON, in his official capacity,

Defendant-Appellant Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, NORTHERN DIVISION IN CASE NO. 3:18-CV-188-DPJ-FKB, HONORABLE DANIEL P. JORDAN, III, CHIEF JUDGE

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ADDENDUM

Summary Chart

STATES WITH PERMANENT CRIMINAL DISENFRANCHISEMENT PENALTIES FOR NON-ELECTION RELATED OFFENSES AS OF NOVEMBER 2023 (WITH CITATIONS)

State	Citation
Alabama[†]	Ala. Const. art. VIII, § 177; Ala. Code §§ 15-22-36.1, 17-3-31
Arizona[†]	Ariz. Rev. Stat. §§ 13-904, 13-906 to 909, 16-101
Delaware[†]	Del. Const. art. V, § 2; Del. Code Ann. tit. 15 § 6102-04
Florida[†]	Fla. Const. art. VI, § 4; Fla. Const. art. IV, § 8; Fla. Stat. § 944. 292(1)
Iowa[*]	Iowa Const. art. II, § 5; Iowa Code § 48A.6; Exec. Order No. 7 (Iowa 2020)
Kentucky[*]	Ky. Const. § 145; Ky. Rev. Stat. Ann. §116.025; Exec. Order No. 2019-003 (Ky. 2019)
Mississippi	Miss. Const. art. XII, §§ 241, 253
Nebraska[†]	Neb. Const. art. VI, § 2; Neb. Rev. Stat. §§ 29-112 to 113, 32-313
Tennessee[†]	Tenn. Const. art. 1, § 5; Tenn. Const. art. 4, § 2; Tenn. Code Ann. §§ 2-19-143, 2-2-139, 40-20-112, 40-29-201 to 202, 40-29-204
Virginia	Va. Const. art. II, § 1; Va. Const. art. V, § 12; Va. Code Ann. §§ 24.2-101, 53.1-231.1-2
Wyoming[†]	Wyo. Const. art. VI, § 6; Wyo. Stat. Ann. §§ 6-1-104, 6-10-106, 7-13-105

[†] As of November 2023, these states only impose a lifetime voting ban for individuals convicted of certain categories of disenfranchising offenses, and instead restore voting rights after sentence completion for many or most categories of other disenfranchising offenses.

[*] As of November 2023, these states have issued Executive Orders that restore voting rights to felons convicted of some or all categories of disenfranchising offenses.